Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1976

No. 76-289

RONALD EUGENE BRASEL,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Missouri

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Rules Involved	2
Statement	3
Manner in Which the Federal Questions Were Raised	6
Reason for Granting the Writ	8
Conclusion	12
Appendix A—Opinion of the Missouri Supreme Court	A-1
Appendix B—Petition for Rehearing	A-18
Appendix C—Order Overruling the Petition for Rehearing	A-25

Cases Cited

Beck v. Ohio, 379 U.S. 89, 91 1964)	8
Carpenter v. U.S. (CA 10 Kan), 463 F2d 397, cert den 409 US 985, 34 L Ed 2d 251, 93 S Ct 337, 339	9
Chimel v. California, 396 U.S. 752 (1969)	11
People v. Johnson (1969), 70 Cal 2d 541, 75 Cal Rptr 401, 450 P2d 865, 43 ALR3d 366	11
United States v. Robinson, 414 U.S. 218, 235 (1973)	12
U.S. v. DiRe, 332 U.S. 581	11

U.S. v. Fike (CA 5 Ala), 449 F2d 191 10

Wong Sun v. United States (1963), 371 US 471, 9 L Ed 2d 441, 83 S Ct 407 ..... 9, 10

Statutes and Rules Cited

United States Constitution, Amendment IV 2

United States Constitution, Amendment V 2

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PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Missouri

Ronald Eugene Brasel, Petitioner, prays that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of Missouri, En Banc, entered in this cause on June 14, 1976. A petition for rehearing was overruled on July 13, 1976.

OPINION BELOW

The opinion of the Missouri Supreme Court is not yet reported and is attached as Appendix A. The petition for rehearing and the order overruling said petition are attached as Appendix B and Appendix C.

JURISDICTION

The judgment of the Supreme Court of Missouri (Appendix A) was entered on June 14, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Whether the Petitioner's rights to protection under the Fourth Amendment of the United States Constitution were violated by the admission into evidence of articles, photographs and a videotaped confession obtained by and resulting from an illegal search and seizure.

2. Whether the Petitioner's rights to due process were violated when the Supreme Court of Missouri went beyond the testimony and transcripts in attempting to find probable cause for Petitioner's arrest.

3. Whether the Supreme Court of Missouri has decided the issue of illegal search and seizure and the "poison fruit" doctrine in a way not in accord with applicable decisions of this Court.

STATUTES AND RULES INVOLVED

The Constitution of the United States, Amendment IV, provides:

> Amendment IV. Searches and seizures.
>
> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . ."

The Constitution of the United States, Amendment V, provides:

> Amendment V. Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property
>
> ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law; . . ."

STATEMENT

Petitioner, a licensed pharmacist, was originally charged in a two-count indictment with unlawful possession of 162 capsules of Sodium Secobarbital, Schedule II (Count I) and unlawful possession of 31 capsules of Methamphetamine Hydrochloride, Schedule II (Count II). An information was subsequently filed charging him in Count I with unlawful possession of 162 capsules of Sodium Secobarbital, Schedule III, and in Count II with unlawful possession of 31 capsules of Methamphetamine Hydrochloride, Schedule II. Later, the information was further amended to charge him in Count I with unlawful possession of 162 capsules of Secobarbital, Schedule III, and in Count II with unlawful possession of 31 capsules of Amphetamine, Schedule II.

A motion to suppress all of the evidence as being the result of an unlawful and unreasonable search and seizure was heard and overruled by the Circuit Court.

The case was tried to a jury in the Circuit Court of St. Louis County, Missouri, before the Hon. Paul E. Corning, Jr. During the trial counsel for the Petitioner renewed his objections to the introduction of each exhibit offered by the State, which exhibits had been obtained from the Petitioner's person, his valise and his motel room and also included photographs of his motel room and a videotaped confession. At the close of all the evidence, the jury returned a verdict of Guilty on both counts, but advised the judge that it was unable to agree on the punishment and, in accordance with the Court's Instruction No. 14, asked that

the Court assess the punishment. Petitioner's motion for new trial was overruled and he was sentenced to four (4) years in the Missouri Department of Corrections on Count I and a concurrent term of four (4) years on Count II. Execution of the sentence was stayed and Petitioner was placed on probation for five (5) years.

The question presented for determination on appeal involved the prior overruling of Petitioner's motion to suppress the evidence, and subsequent failure and refusal by the trial judge to reconsider said motion and in admitting the articles into evidence. The facts relevant to this question are as follows:

Petitioner, Ronald Eugene Brasel, under the name of "Ronald Bradley" checked into and paid for a motel room at the Inn America Motel in St. Louis County, Missouri, one week in advance, from April 10-17, 1972, and then on April 17th he paid for the same room up through 12:00 noon on Tuesday, April 25, 1972. On Sunday, April 23, 1972, Petitioner was telephoned by the housekeeper and he advised her that he did not want maid or clean-up service. A "Do Not Disturb" sign was on his door. The following day, Monday, April 24, 1972, there again was the "Do Not Disturb" sign on the door of his room.

While Petitioner was away from his room on Monday, April 24, 1972, and without his permission, a maid used her pass key to open the door to his room, Room 233, and entered. She testified that the bed was torn up and there were bags of medicine on the floor. She then left the room, returning a few minutes later with the housekeeper. Using the housekeeper's key they again unlocked the door, entered the room and looked around. They left the room shortly thereafter, closing the door after them. A third unauthorized entry was made about 5 minutes later by the manager of the motel in the accompaniment of the housekeeper. They remained in the room about 10 or 15 minutes before leaving.

After returning to his office the manager, a Mr. Armstrong, telephoned the police. There was no testimony as to what he told them on the phone. About 15-20 minutes later five County Police officers arrived. After telephoning Petitioner's room to be sure he had not returned, the five officers with the manager went back to Room 233, unlocked the door with a master key, entered and carefully searched the room. In the room they observed grocery-type bags containing many different colored tablets and capsules, as well as bottles, some of the bags bearing the name "Brasel Pharmacy".

Arrangements were then made for the police to occupy the adjoining room (Room 231) awaiting Petitioner's return, after first having the manager open the door connecting the two rooms. For the next 6½ hours the police occupied Room 231, maintaining access to Petitioner's room through the open connecting door. During this period of time they made phone calls to their police headquarters and interviewed the housekeeper; but at no time did they attempt to obtain a warrant for the arrest of the Petitioner.

At about 10:00 p.m. the Petitioner was seen pulling onto the parking lot of the motel and, thereafter, was viewed by the officers, as he passed them in Room 231, carrying a black valise and some clothing over his arm. After hearing him enter Room 233 all five officers and the motel manager went to the outside door of that room and Detective Zinselmeier knocked on the door. When Petitioner opened the door the detective identified himself, placed Petitioner under arrest and they all entered the room. After Petitioner was advised of his rights, a search was made of his person, the locked valise he had carried into the room, and again of the remainder of the room. The items for which he was charged in Count I, 162 capsules of secobarbital, were taken from Petitioner's pocket, and the items for which he was charged in Count II, 31 capsules of amphetamine, were taken from the closed valise. Additional police

personnel were called and photographs were taken of the room. Statements were taken from Petitioner in the room and in the automobile en route to police headquarters; and at approximately 12:55 a.m. on April 25, 1974, a videotape statement was made by Petitioner at headquarters.

MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED

A motion to suppress all of the evidence, as being the result of an unlawful and unreasonable search and seizure, was filed in the Circuit Court on July 11, 1972, four days following Petitioner's arraignment. Such motion was argued on April 26, 1973, and thereafter, on May 31, 1973 the motion was overruled by memorandum upon order of Circuit Judge Herbert Lasky. (2nd Supplement to Transcript on Appeal, pp. 2-4.)

Subsequently, counsel for Petitioner renewed his objections to the introduction of each exhibit offered by the State during the trial, State's Exhibits 1 through 19, which exhibits had been obtained from the Petitioner's person, valise and motel room, and included the photographs of the motel room and videotape confession of Petitioner (Tr. 47-53, 78-79, 90-92).

Thereafter, on September 17, 1973, Petitioner's motion for new trial was filed, enumerating the errors of the trial judge in admitting such exhibits into evidence (Tr. 349-359). It was heard and taken as submitted on November 30, 1973; and on December 15, 1973, it was overruled (Tr. 359).

On February 20, 1974 notice of appeal was filed to the Missouri Court of Appeals, St. Louis District from the judgment of conviction entered on the eleventh day of February, 1974 (Tr. 361). The case was argued before the Court of Appeals on April 18, 1975, and on July 22, 1975, that court

entered its order affirming the conviction of Count I and reversing on Count II. Petitioner filed, on August 5, 1975, an application for rehearing or for transfer to the Supreme Court of Missouri, which application was denied on September 8, 1975.

On October 1, 1975, Petitioner filed an application with the Supreme Court of Missouri for transfer of the case to that court, which application was denied on October 13, 1975. However, the court, on its own motion, transferred the cause to that court on that date. The matter was argued and submitted on January 22, 1976, and on June 14, 1976 the court handed down its decision and opinion (Appendix A).

REASONS FOR GRANTING THE WRIT

1 and 2

The Supreme Court of Missouri, on page 6 of its opinion, sustained Petitioner's contention that the officers could not "utilize and rely upon information obtained by their entry into and search of room 233 during the afternoon of April 24." This illegal entry and search formed the basis of Petitioner's motion to suppress the evidence, which motion was renewed at the trial and eventually became the crux of Petitioner's appeals.

However, the Supreme Court went on to attempt to establish probable cause for Petitioner's arrest independent of the "illegal search," in direct contradiction to the sworn testimony of the police officer making such arrest who had stated, under oath, that following their stake-out of the room he arrested the Petitioner based "on what I had seen in the room prior to that" (S.Tr. 126).

The Court went on at length to discuss the nature of probable cause and the reliability of informants, citing numerous cases therefor, including *Beck v. Ohio*, 379 U.S. 89, 91 (1964), which defines probable cause in these words:

> * * * Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.

As shown in the *Beck* case, as well as the many other cases cited by the Court in its opinion on this point, the probable

cause is what is in the mind of the arresting officer at the time he makes the arrest. Therefore, the Court must be limited in such matters by the testimony of the officer himself, as set out in the transcripts, rather than speculating as to any other reasons he *might* have had for making such arrest.

On this issue, the Missouri Supreme Court concluded "that the officers did receive information from the motel personnel which, without reliance on their own search of room 233, provided probable cause for arrest of defendant." (Opinion p.7) However, the Court admitted, on pages 9-10 of their opinion that:

> Unfortunately, no one asked Armstrong or the officers to recite the full details of what he told them when he telephoned or when he talked to them shortly thereafter when they came to his office. . . . The fact that *five* officers responded to the call *WOULD INDICATE* that substantial information as to what Armstrong had observed with reference to the drugs was given. (Additional emphasis supplied.)

Thus, the Court admits that it has gone beyond the transcripts and, in direct contradiction to their sworn testimony, has speculated as to what *might* have been in the minds of the arresting officers.

3

The primary question in this case seems to be whether the evidence objected to was derived by exploitation of the illegal search or by means sufficiently distinguishable to be purged of the primary taint. *Carpenter v. U. S.* (CA 10 Kan.), 463 F2d 397, cert den 409 US 985, 34 L Ed 2d 251, 93 S Ct 337, 339. See also *Wong Sun v. United States* (1963), 371 US 471, 9 L Ed 2d 441, 83 S Ct 407. If the government can

show that it obtained the challenged evidence by lawful means and from a source *completely* independent of the illegality, the policy set forth in *Wong Sun* is satisfied. In the instant case, not only was there no "completely independent" source, but the government did not even attempt to show such, as shown by the recorded testimony of the officer that he arrested Petitioner because of what he had seen in his room earlier.

The Court, in this case, in attempting to find probable cause from independent sources, cites the officers' interview with the motel housekeeper and their telephone checks of Petitioner's automobile license number taken from his motel registration (indicating his use of a false name in registering at the motel). What the Court, however, has overlooked is the fact that these "independent" contacts were made during the time that the police were either in Petitioner's motel room or when "staked out" in the connecting room and exerting control over Petitioner's room after their illegal entry and search. Clearly this does not meet the requirements of being "sufficiently distinguishable to be purged of primary taint of illegality". *U.S. v. Fike* (CA5 Ala), 449 F2d 191.

While the Missouri Supreme Court has commented and ruled on the Petitioner's objections to introduction of the capsules found in his pocket and valise subsequent to his arrest, it has failed to note that Petitioner's motion to suppress included not only those items for which he was charged, but extended to introduction of all of the items found in his room during the illegal afternoon search as well as photographs of his room and his subsequent confession, all of which were admitted into evidence over Petitioner's objections.

It might be well to note here that Petitioner has never been charged with any crime stemming from his possession of the articles seen in his room, only with those items Petitioner brought in with him that night. It is therefore safe to assume, and in

fact it has been found, that no violation existed by his possession of those articles.

The "poison fruit" doctrine has been extended to confessions obtained as a result of unlawful activity or by the authorities' exploitation of an unlawful search. "To hold otherwise would permit the authorities to profit from their unlawful activity and furnish an incentive for unlawful searches in violation of the Fourth and Fourteenth Amendments in the hope that the direct fruits of the search might be manipulated in such a way as to produce admissible evidence." *People v. Johnson* (1969), 70 Cal 2d 541, 75 Cal Rptr 401, 450 P2d 865, 43 ALR3d 366. In *Johnson* the court held, inter alia, that the state had not sustained its burden of proving a break in the chain of causation between the unlawful search and ultimate confession nor of showing a sufficiently independent means of having obtained the defendant's confession, and the fact that the defendant was properly advised of his Miranda rights did not, per se, preclude application of the exclusionary rule.

In reviewing the opinion of the Missouri Supreme Court, it can be seen that a great deal of discussion was had regarding the legality of the search of Petitioner's valise, as possibly being in violation of the guidelines set forth in *Chimel v. California*, 395 U.S. 752 (1969).

While Petitioner agrees with the conclusions of Chief Justice Robert E. Siler in his separate opinion, and feels that the state did not bear its burden of establishing that the search of the valise was within the permissible scope of searches and seizures incident to lawful arrests, Petitioner contends that such question is moot in light of our argument that the arrest of Petitioner, predicated upon an illegal search, was in itself unlawful.

Knowledge obtained as a result of an unreasonable search and seizure may not be used to arrest a defendant at a later time. *U.S. v. DiRe*, 332 U.S. 581.

It is the fact of the lawful arrest which establishes the authority to search. *United States v. Robinson*, 414 U.S. 218, 235 (1973).

In light of the foregoing, the Petitioner contends that the Missouri Supreme Court, in affirming Petitioner's conviction, has ruled in direct opposition to the applicable decisions of this Court on the issue of illegal search and seizure and the "poison fruit" doctrine.

CONCLUSION

For the reasons stated herein, I respectfully submit that the Petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the Supreme Court of Missouri
En Banc

State of Missouri,
Respondent,

vs.

Ronald Eugene Brasel,
Appellant.

No. 59243

Appeal From the Circuit Court of St. Louis County
Honorable Paul E. Corning, Jr., Judge

This is an appeal from a conviction on a two-count indictment for unlawful possession of controlled substances in violation of § 195.017.[1] Defendant was sentenced to concurrent four year terms on each count, but sentence was suspended and defendant was placed on probation for five years. Defendant appealed to the Missouri Court of Appeals, St. Louis District, which affirmed the conviction on Count I, but reversed and remanded on Count II. After application to transfer by both defendant and the State, we ordered the case transferred and now decide it as though here on direct appeal. Art. V, § 10, Mo. Const.

Disposition of this case depends on whether the arrest of defendant without a warrant was based on probable cause and whether certain searches and seizures incident to that arrest were lawful. We conclude that both of these questions are to be answered in the affirmative. Hence, we affirm the judgment.

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[1] All statutory references are to RSMo 1969 unless indicated otherwise.

On April 10, 1972, defendant registered at the Inn America Motel in St. Louis County as a chemist named Ronald Bradley from Kansas City. He was assigned room 233 for which he paid one week in advance. Subsequently, he paid for a second week which ran to April 25, 1972.

On Saturday, April 22 and again on Sunday, April 23, the maid assigned to clean a block of rooms which included room 233 noticed a "Do Not Disturb" sign on the door leading to that room. On each day it remained on the door into the afternoon. On Saturday, the maid did nothing, but after it remained until mid-afternoon on Sunday, April 23, she reported this fact to Mrs. Sandler, her supervisor. Mrs. Sandler then called room 233. Someone answered the telephone and indicated he did not want the room made up. She then did nothing further.

Again, on Monday the maid noticed a "Do Not Disturb" sign on the door. About mid-afternoon, she knocked on the door and when she received no response, she used her key and entered the room. She observed bottles of what appeared to be medicines on the dresser and sacks of such bottles on the floor. She stated that the bed was all torn up. She went next door and called Mrs. Sandler to report what she had seen. Mrs. Sandler then came and opened the door and both she and the maid entered room 233. After observing the room and its contents, Mrs. Sandler reported the matter to Mr. Armstrong, the motel manager.

Mr. Armstrong first checked the registration for the room. He then called the room but received no response. He and Mrs. Sandler then went to room 233, unlocked the door and entered. Armstrong remained in the room ten or fifteen minutes during which time he examined the grocery-type paper sacks which contained large quantities of drugs as well as the containers on the dresser. He observed that these bottles contained pills and capsules and many had federal warrants on them.

After closing and locking the door, Armstrong returned to his office and called the county police. He told the officers that there was a large assortment of drugs in the room in question. Shortly thereafter, five officers from the St. Louis County drug squad came to Armstrong's office. He showed them defendant's registration card, which showed the name Ronald Bradley and gave the license number of his automobile. Armstrong stated that he wanted to show them what he had observed and he then took the officers to room 233. Armstrong unlocked the door and he, followed by the officers, entered. The officers then observed first hand the bottles of pills and capsules on the dresser and in the paper sacks which Armstrong had reported to them. Federal warrants were attached to many of the bottles and one officer estimated that there could be 300,000 pills and capsules. The officers then contacted police headquarters for a check on the license number shown on defendant's registration card and thereby learned that the car was registered to Ronald Brasel of St. Louis County, not Ronald Bradley of Kansas City.

After their examination of room 233 and its contents, the officers arranged with Armstrong to occupy the adjoining room for the purpose of a stakeout of room 233. They remained there until about 10 o'clock that night when defendant returned to the motel. He was observed parking his automobile and then coming to his room carrying an attache case and some clothes. Shortly after the officers heard defendant enter room 233 and close the door, Officer Zinselmeier knocked on the door of room 233. When defendant opened the door, Zinselmeier displayed his police badge and asked if he might come in. Defendant, according to the officer, indicated that he could enter and opened the door wider for that purpose. Zinselmeier then entered, as did Officer Reifschneider who had been standing by Zinselmeier. The other officers also had come out of the adjoining room, but it is not clear from the transcript whether they were standing at the door when it was opened by defendant Brasel. In any event they entered defendant's room shortly after Zinselmeier and Reifschneider entered.

Immediately on entering, Zinselmeier asked defendant for some identification. He produced his driver's license and stated that he was Ronald Brasel. Officer Zinselmeier then placed him under arrest on suspicion of unlawful possession of controlled substances and frisked him. When the officer patted defendant's pants pocket, he felt a large bulge. He reached into the pocket and discovered a quantity of pills.[2] The attache case which defendant had carried as he returned to the room was on a chair about four feet from defendant. It was opened promptly and in that search other pills were found.[3]

Count I of the information on which defendant was prosecuted was based on possession of the pills found in defendant's trouser pocket. Count II was based on the pills found in the attache case. Defendant was not prosecuted for the possession of the large quantity of pills which were in room 233 and which had been observed there by the motel personnel and later by the officers.

Defendant filed a motion to suppress the evidence obtained by the search of the defendant's person and his attache case. The court overruled that motion and admitted in evidence the pills found in defendant's trouser pocket and the pills found in his attache case. Defendant complains with reference thereto on appeal. Since these searches were incident to an arrest and not pursuant to a search warrant, we must determine first whether the arrest of defendant by Officer Zinselmeier after he entered the room was a lawful arrest, that is, whether it was made with probable cause.

Probable cause was defined in Beck v. Ohio, 379 U.S. 89, 91 (1964), in these words:

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[2] There were 162 red colored capsules later determined to be seconal barbituates.

[3] There were 31 amphetamine capsules.

> "* * * Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."

A further explanation of what is necessary for there to be probable cause was given in Brinegar v. United States, 338 U.S. 160, 175 (1949):

> "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved."

A recent decision by this court involving the issue of probable cause was State v. Wiley, 522 S.W.2d 281 (Mo. banc 1975), wherein the court reviewed the law on probable cause and then considered the validity of a warrantless arrest, as well as the admissibility of evidence seized incident to that arrest. Responding to anonymous tips giving officers the specific location of suspects and specific information indicating that the suspects possessed controlled substances, the officers approached the front door of the suspects' apartment, announced that they were police officers, arrested the occupants for possession of controlled substances and searched the area which the informer had stated would house the drugs. In considering the legality of the arrest, the court stated, 522 S.W.2d at 287,

> "The evidence to be admissible in the case must be the 'product of a search incident to a lawful arrest, since the officers had no search warrant. The lawfulness of the ar-

rest without warrant, in turn, must be based upon probable cause, which exists "where *'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed.*" Brinegar v. United States, 338 U.S. 160, 175, 176, 69 S. Ct. 1302, 1311, 93 L. Ed. 1879, 1890 (1949), quoting from Carroll v. United States, 267 U.S. 132, 162, 45 S. Ct. 280, 69 L. Ed. 543, [555], 39 A.L.R. 790 (1925).' Ker v. California, 374 U.S. 23, 34-35, 83 S. Ct. 1623, 1630, 10 L. Ed. 2d 726 (1963).

"Whether there was probable cause to arrest the appellant along with others in the apartment *depends on the information in the officers possession prior to the arrest.* Of course, *all the information in the possession of the officers and all reasonable inferences therefrom are pertinent to determine probable cause.* Whether there is justification for probable cause to arrest without warrant must be determined by *practical considerations of everyday life on which reasonable men act and is not to be determined by hindsight by legal technicians.* Draper v. United States, 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959). The determination of probable cause depends upon the particular facts and circumstances of the individual case and no ready 'litmus paper test' can be applied. Probable cause may be based on hearsay. There is a broad gulf between what is required to prove guilt and the requirement of probable cause. We deal here with controlled substances. In such cases officers may well have to depend on informers, special employees and on their own special experience. United States v. Kancso, 252 F.2d 220 (2nd Cir. 1958)." (Emphasis supplied.)

In deciding whether the officers had probable cause in this case for arresting defendant, we conclude that they could not

utilize and rely upon information obtained by their entry into and search of room 233 during the afternoon of April 24. They had no search warrant and they had no consent from defendant to enter and search. The motel personnel could not give such permission. Cases so holding include Stover v. California, 376 U.S. 483 (1963), in which the court refused to uphold a police search of a hotel room based upon the hotel clerk's consent to the entry, stating at 489:

> "It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent."

To the same effect *see* United States v. Jeffers, 342 U.S. 48 (1951).

However, the fact that the officers made an unauthorized entry and search of room 233 does not make the subsequent arrest of defendant illegal if the officers had sufficient information, received independently of the illegal search, to provide probable cause for the arrest. For the reasons subsequently discussed, we conclude that the officers did receive information from the motel personnel which, without reliance on their own search of room 233, provided probable cause for arrest of defendant.

First, this information, received by the officers from the motel people, came from a reliable informant. Armstrong occupied a position of considerable responsibility. He was the manager of a substantial business. Some of his employees discovered and reported to him large quantities of drugs in one of the motel rooms occupied by a guest. He did what a manager would be expected to do, and notified the police of those facts. The police came to his office and talked to him and were shown the room registration filled out by the occupant of the room in question.

Later that afternoon, the officers had an opportunity to verify what the motel personnel had observed when they talked to Mrs. Sandler, the head housekeeper, who also had been in the room and observed its contents.

In State v. Perry, 499 S.W.2d 473 (Mo. 1973), this court considered the reliability of an informant who called the police station and, although not giving his name, identified himself as a Bi-State bus driver. He told the answering officer that he had observed the occupants of a car flourishing a weapon, describing and giving the license number of the car. In holding that the informant was reliable, the court said, 499 S.W.2d at 475, 476:

> "In the absence of exceptional circumstances not here present a citizen-informant who states that he has witnessed a crime may reasonably be deemed by an arresting officer to be reliable, McCreary v. Sigler, 406 F.2d 1264, 1269 (8th Cir. 1969), cert. den. 395 U.S. 984, 89 S. Ct. 2149, 23 L. Ed. 2d 773; Smith v. Swenson, 328 F. Supp. 747 (W.D. Mo. 1971), although his reliability has not theretofore been proved or tested. State v. Whorton, 487 S.W. 2d 865 (Mo. 1972). *The informant in this case was no mere tipster suggesting to police the possibility that an offense may have been committed in the past or might be committed in the future.* His report was not based upon suspicion, underworld rumors or hearsay. Nor was he giving mere conclusions with respect to the commission of offense. *This informant gave a straightforward eyewitness account of what had happened, of his own personal knowledge. He gave specific information* identifying the automobile, including the license number. 'There could only be one car in existence that could fit that precise description.' Conley v. Beto, 328 F. Supp. 49, 53 (S.D. Tex. 1971). *His information led the police directly to appellant.* United States ex rel. Cardaio v. Casseles, 446 F.2d 632, 636-637 [3] (2nd Cir. 1971). While the informant's name was not made known his occupation of bus driver was given." (Emphasis supplied.)

Applying the tests utilized in *Perry*, it is evident that Armstrong was a reliable informant.[4]

Second, the protection of the fourth amendment against unreasonable search and seizure does not apply to actions of private individuals not acting pursuant to a request by the police. In this case there was no contention that the police had anything to do with the entry and search of room 233 by motel personnel. Hence, the information given by Armstrong to the police did not violate defendant's fourth amendment rights, even though such entry and search were without the consent of the occupant. Therefore, the information derived therefrom and passed on to the police could be relied upon by the police to establish probable cause. In Burdeau v. McDowell, 256 U.S. 465, 475 (1921), the Supreme Court enunciated this principle, stating,

> "The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of the sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued."

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[4] In this connection see also discussion by court in State v. Cox, 200 N.W.2d 305, 306-7 (Minn. 1972), including footnote 1 thereto and the cases cited therein.

In Coolidge v. New Hampshire, 403 U.S. 443, 488 (1971), the court concluded that the fourth amendment exclusionary rule was only applicable to prevent police misconduct and stated,

> "But it is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals."

Other cases which hold that the fourth amendment protections do not apply to private action are Kaufman v. United States, 453 F.2d 798 (8th Cir. 1971); United States v. McGuire, 381 F. 2d 306 (2nd Cir. 1967); United States v. Burton, 341 F. Supp. 302 (W.D. Mo. 1972); State v. Stark, 503 S.W.2d 261 (Mo. 1973); State v. Hepperman, 349 Mo. 681, 162 S.W.2d 878 (1942).

We conclude that the information relayed by Armstrong and that which the officers acquired by checking with police headquarters was sufficient to establish probable cause to arrest. The officers had been told by Armstrong, the manager, that he had observed large quantities of drugs in one of his motel rooms, a place where one is not reasonably expected to be in possession of large quantities of drugs. What he reported caused *five* drug squad officers to come at once to Armstrong's office. They talked to Armstrong and were shown defendant's registration card. They subsequently learned by a check at their headquarters that the automobile license listed by the occupant was registered to Ronald Brasel of St. Louis County, not Ronald Bradley of Kansas City, the name defendant had used in registering. Later that afternoon, as previously noted, the officers also talked to Mrs. Sandler, the housekeeper.

Unfortunately, no one asked Armstrong or the officers to recite the full details of what he told them when he telephoned or when he talked to them shortly thereafter when they came to his office. Whether, in addition to stating that he had observed

large quantities of drugs in a motel room, he detailed the fact that there were paper sacks filled with bottles of drugs, as well as many bottles on the dresser, and whether he told them that many bore federal warrants, indicating controlled substances, was not asked. The fact that *five* officers responded to the call would indicate that substantial information as to what Armstrong had observed with reference to the drugs was given. We conclude and hold that from the above sources, without considering any information the officers obtained by their mid-afternoon search of room 233, Officer Zinselmeier had sufficient information when he arrested defendant to warrant a prudent man, based on "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act,"[5] to arrest defendant on suspicion of unlawful possession of controlled substances.

This being true, were the searches of defendant's person and attache case permissible searches incident to the lawful arrest of defendant by Officer Zinselmeier?

The right of an officer to conduct a full search of the person incident to a lawful custodial arrest was discussed at length and clearly delineated in United States v. Robinson, 414 U.S. 218, 235 (1973), in this language:

> "* * * The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case

[5] Brinegar v. United States, 338 U.S. at 175.

> of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment."

Accordingly, we hold that the search of defendant's person by Officer Zinselmeier immediately after he was placed under arrest was lawful and the trial court properly overruled defendant's motion to suppress the 162 seconal barbituate capsules.

In United States v. Chimel, 395 U.S. 752 (1969), the court recognized that in addition to the right of an officer to search the person of one placed under arrest, the officer may also search for weapons and evidence of the crime in the area referred to as being within the arrested person's immediate control. This right was recognized in this language at p. 762:

> "* * * When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."

The evidence indicates that the attache case was on a chair perhaps four feet from the defendant. It was not locked. It

did have a catch but it could be released by merely pushing a button. Officer Zinselmeier testified that he did not know what was in the case but that he searched it, primarily looking for weapons, but also to ascertain whether it contained drugs. There were other officers in the room at the time, but no evidence was introduced that they were so placed that it was impossible for defendant to reach and enter the attache case. At some point, defendant was handcuffed but the evidence does not show that this had occurred prior to search of the attache case. On the record before us, we cannot conclude that defendant could not, by a quick movement, reach the attache case and obtain a weapon concealed therein or destroy evidence contained in the case. Accordingly, we hold that the search of the attache case did fall within the limits prescribed by *Chimel* and the amphetamine capsules obtained in said search were admissible in evidence in support of Count II.[6]

Judgment affirmed.

JAMES A. FINCH, JR.
Judge

Morgan, Holman, Bardgett, Henley, and Donnelly, JJ., concur; Seiler, C.J., concurs in part and dissents in part in separate opinion filed.

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[6] Cases in the federal and state courts considering the propriety under *Chimel* of searches of the area alleged to be within the immediate control of the person arrested are legion. We see no need to engage in an extended analysis and review of those cases. Support for the conclusion we reach can be found in the following: State v. Henderson, 510 S.W.2d 813, 819 (Mo. App. 1974); United States v. Mason, 523 F.2d 1122 (D.C. Cir. 1975); United States v. Jones, 475 F.2d 723 (5th Cir. 1973); United States v. Harrison, 461 F.2d 1127 (5th Cir. 1972); United States v. Simpson, 330 A.2d 756 (D.C. 1975); State v. Cox, 200 N.W. 2d 305 (Minn. 1972); State v. Fulford, 187 N.W.2d 270 (Minn. 1971); State v. Mayer, 283 A.2d 863 (Vt. 1971); People v. King, 96 Cal. Rptr. 464, 487 P.2d 1032 (In Bank 1971); Simberg v. State, 179 N.W.2d 141 (Minn. 1970); People v. Doss, 44 Ill. 2d 541, 256 N.E.2d 753 (1970).

In the Supreme Court of Missouri
En Banc

State of Missouri,
Respondent,
vs.
Ronald Eugene Brasel,
Appellant.
No. 59243

Opinion Concurring in Part and Dissenting in Part

I concur in the affirmance of the conviction on Count I but dissent as to Count II. The state failed to carry its burden of proof as to valid grounds for making a warrantless search of the attache case, in which were found the drugs on which the conviction under Count II rests.

Who has the burden of proof to show, in the words of the leading case on the subject, Chimel v. California, 395 U.S. 752 (1969), that the search beyond the person of the arrestee is in an area "within his immediate control"? It is the prosecution, because as that case and many others hold, the burden is on those seeking an exemption from the requirement of a search warrant to show the need for it. "The exceptions are 'jealously and carefully drawn' . . . '[T]he burden is on those seeking the exemption to show the need for it.'" Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971).

It follows that when the search is sought to be justified because it is of an area within the immediate control of the person arrested, the burden is on the prosecution to show that such is the fact if it is to prevail on the motion to suppress. See, for example, United States v. Marotta, 326 F. Supp. 377, 384 (S.D. N.Y. 1971), affirmed without opinion, 456 F. 2d 1336 (2d Cir.

1972), where the court sustained a motion to suppress over the government's contention that the seizure was lawful under Chimel, supra, as being in the area within the immediate control of the person arrested, ". . . *the Government not having shown* . . . that the search and seizure was within the permissible scope of searches and seizures incident to lawful arrests . . ." (emphasis supplied). In Scott v. State, 7 Md. App. 505, 256 A. 2d 384, 389 (1969), the court says: "We think that Chimel requires that *the State show* that the search was conducted and items were seized in an area 'within the reach' of the arrestee in this concept . . ." (emphasis supplied). See, also, United States v. Jones, 475 F. 2d 723, 727 (5th Cir. 1973), stating: "Because the search here must now be characterized as warrantless, *the government must establish* that it is within one of the exceptions to the warrant requirement" (emphasis supplied). The case dealt with the search of a suitcase about a foot and a half away from the head of the bed on which defendant was asleep when arrested.

See, also, State v. Sutton, 454 S.W. 2d 481, 490 (Mo. banc 1970) (Finch, J., dissenting), ". . . the burden of proof to establish that some exception is applicable *rests on the government* . . ." (emphasis supplied).

In the case before us, the attache case was closed and at least four feet distant from the defendant. The manpower arrayed against defendant was overpowering. One officer, Zinselmeier, had placed defendant under arrest and had searched his person, while defendant was leaning against the wall, facing it, hands up. Another officer, Reifschneider, was in the room, having entered with Zinselmeier. Three other officers were present in the room, but "no evidence was introduced that they were so placed that it was impossible for defendant to reach and enter the attache case," although Zinselmeier was close enough to the attache case so that he opened it "promptly", which included undoing the clasp. The defendant was handcuffed, but the evidence

does not show when with relation to the opening of the attache case. The principal opinion asserts that "On the record before us, we cannot conclude that defendant could not, by a quick movement, reach the attache case and obtain a weapon concealed therein or destroy evidence contained in the case." It seems to me this places the burden on the defendant to show that he could not have acted to accomplish the above, whereas the burden to show facts justifying the exemption is on the state, which failed to carry it, although the state had five police officers who should have been able to establish the facts if they in truth existed in their favor.

In my opinion, it is clear that under the circumstances the attache case was not within the immediate control of the defendant. But if I am mistaken, then the most that can be said on the other side of the coin on the evidence before us is that it is unclear and speculative whether the attache case was in the immediate control of the defendant in the sense that he could have gotten to and opened it in time to seize a weapon or destroy incriminating evidence therein. This is not sufficient to carry the prosecution's heavy burden of proof. In fact, if the situation were such that there was a good chance defendant could have gotten to the attache case and made use of its contents, the action of Zinselmeier in opening it "promptly" would have enhanced the opportunity. It would have helped defendant do what the police did not want him to do. I do not believe the police officer would have made any such foolish move, had there been any possibility defendant could have taken advantage of it, which further leads me to believe the prosecution had no evidence available which would support the exemption by which they would be entitled to search the attache case.

The holding of the principal opinion is opposed to the basic proposition established years ago that constitutional provisions for the security of person and property should be liberally construed. Boyd v. United States, 116 U.S. 616, 635 (1886). Of-

ficer Zinselmeier no doubt was using his best judgment that he should search the attache case,[1] but that does not mean that his judgment is not properly subject to constitutional scrutiny or that he has the right to abrogate the Fourth Amendment.

In my opinion, the search of the attache case was illegal on the record before us and the conviction on Count II should be reversed and I therefore respectfully dissent as to Count II.

ROBERT E. SEILER, Chief Justice

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[1] Zinselmeier and the others had seen defendant enter the motel room carrying the attache case and Zinselmeier testified it was his policy as incident to any arrest for him to search "whatever possessions a person has with him." With this as his guideline, it is not a strained conclusion that once Zinselmeier had defendant under arrest, he would promptly have searched the attache case no matter where it was in the room.

APPENDIX B

In the Supreme Court of Missouri
En Banc

State of Missouri,
Respondent,
vs.
Ronald Eugene Brasel,
Appellant.
No. 59243

Appellant's Motion for Rehearing

Comes now the appellant, Ronald Eugene Brasel, by and through his attorney of record, David C. Godfrey, and respectfully moves this Honorable Court grant to him a rehearing in accordance with Supreme Court Rule 84.17 in that this Court, as shown by its opinion, has overlooked or misinterpreted certain material matters of fact, that is, the sworn testimony of St. Louis County Police Officer James Reifschneider given at the hearing on defendant's motion to suppress evidence and the testimony of St. Louis County Police Officer Zinselmeier on cross-examination at the trial contradicting his earlier statements and corroborating the prior testimony of his partner, Officer Reifschneider. The Court has, further, based its decision on statements it presumed were made but which were not to be found in evidence, as set out in detail in appellant's Suggestions filed herewith.

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In the Supreme Court of Missouri
En Banc

State of Missouri,
Respondent,
vs.
Ronald Eugene Brasel,
Appellant.
No. 59243

Suggestions in Support of Appellant's Motion for Rehearing

The Court, in affirming the judgment of conviction by the St. Louis County Circuit Court, Honorable Paul E. Corning, Jr., Judge, has stated: "Disposition of this case depends on whether the arrest of defendant without a warrant was based on probable cause and whether certain searches and seizures incident to that arrest were lawful." However, in seeking determination of this point, the Court has completely overlooked the testimony of one of the two police officers in charge of the investigation, which testimony was adduced at the hearing on defendant's motion to suppress the evidence.

The Court has indicated on page 3 of its opinion that:

> "When defendant opened the door, Zinselmeier displayed his police badge and asked if he might come in. . . . Immediately on entering, Zinselmeier asked defendant for some identification. He produced his driver's license and stated that he was Ronald Brasel. Officer Zinselmeier then placed him under arrest on suspicion of unlawful possession of controlled substances and frisked him."

This clearly ignores the testimony of Officer Reifschneider, the partner of Zinselmeier, in which the officer testified (S.Tr. 161-162) that none of the police officers had entered into the motel

room before Mr. Brasel was arrested and, in fact, "Mr. Zinselmeier (was) outside the door when the arrest was effectuated."

Furthermore, Officer Zinselmeier himself gave testimony at defendant's trial (Tr. 141) in direct contradiction to his earlier statements, when asked on cross-examination:

> "Q. And *before you walked into the room*, before you saw these pills or before you looked into his pockets you already had arrested him for suspicion of possession of a controlled substance, is that correct?
>
> A. Yes, sir." (emphasis supplied)

Inasmuch as the sworn testimony of the officers shows that defendant was already under arrest, he could not freely and voluntarily consent to police entry into his room, from which entry probable cause for an arrest might have been gained. Therefore, the assumption by the Court that the subsequent search of defendant was incident to a lawful arrest is invalid.

The Court states at page 4, "we must determine first whether the arrest of defendant by Officer Zinselmeier *after* he entered the room was a lawful arrest, that is, whether it was made *with probable cause*." (emphasis supplied)

The Court then concluded that the information supplied by Armstrong, the motel manager, must have been sufficient inasmuch as it "caused *five* drug squad officers to come at once to Armstrong's office". The Court agrees with appellant that there was no evidence as to exactly what Armstrong had said. The only persons qualified to testify on that point, Mr. Armstrong himself and Officer Reifschneider, the officer to whom he spoke, were never called by the State to testify at defendant's trial. And the Court has chosen to ignore the testimony adduced at the hearing on defendant's motion to suppress in which Officer Reifschneider stated that "Mr. Armstrong said on his telephone

conversation that there was a large assortment of drugs in the room, and in my opinion he didn't know what substance they contained." (S.Tr.171) Mr. Armstrong was not asked what he told the officer when he called him.

Appellant contends that the Court went beyond the testimony when it chose to speculate as to what Armstrong *might* have testified had he been asked the proper questions by the State.

> "Unfortunately, no one asked Armstrong or the officers to recite the full details of what he told them when he telephoned or when he talked to them shortly thereafter when they came to his office. . . . The fact that *five* officers responded to the call *would indicate* that substantial information as to what Armstrong had observed with reference to the drugs was given. . . ." Opinion pages 9-10. (additional emphasis supplied)

The Court has agreed with appellant that the officers "could not utilize and rely upon information obtained by their entry into and search of room 233 during the afternoon of April 24. They had no search warrant and they had no consent from defendant to enter and search. The motel personnel could not give such permission." (Opinion p. 6) The Court further referred to this as "an unauthorized entry and search". And it was only *after* this illegal entry and search that the officers chose to interview the housekeeper, Mrs. Sandler, with regard to what she had seen there.

Thus, in attempting to find probable cause for defendant's arrest, what we have is:

(1) Evidence of a vague and general statement by Armstrong to Officer Reifschneider;

(2) The Court's assumption that what Armstrong said must have been important since five officers responded;

(3) An "unauthorized entry and search" of defendant's room by police officers, during which time they attempted to obtain evidence and corroboration of Armstrong's information.

Inasmuch as defendant was arrested *prior* to the officer's entry into his room that night, as testified to by Officer Reifschneider at the motion hearing—which damaging testimony the State would not produce at defendant's trial—it is clear that without utilizing what was seen by the officers in their prior "unauthorized" and, therefore, illegal entry into his room there was not sufficient probable cause for his arrest, and any subsequent search of his person and room were also illegal and unreasonable.

As shown by its opinion, the Court has attempted to guess what was in the officer's mind at the time of the arrest, that is, upon what he based his "probable cause" for such arrest. This is entirely unnecessary, as at the hearing on defendant's motion to suppress the arresting officer, Officer Zinselmeier, testified as follows: (S.Tr.126)

"Q. Well, on what were you basing your arrest of suspicion?

A. On what I had seen in the room prior to that."

The officer himself admitted that his "probable cause" for arresting defendant was information obtained during their unauthorized entry and search.

Knowledge obtained as a result of an unreasonable search and seizure may not be used to arrest a defendant at a later time. *U. S. v. DiRe*, 332 U.S. 581.

Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it. *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

Appellant contends that the only information the officers received, independent of their illegal afternoon entry into his room, was that given them by Mr. Armstrong, inasmuch as anything else they discovered was obtained while they were either inside of or had direct access to defendant's room.

The Court has apparently assumed that defendant filed a motion to suppress only the evidence obtained by the search of his person and his attache case, which motion was overruled. This, in context of the opinion rendered, is incorrect inasmuch as defendant filed a motion to suppress *all* of the evidence, which included the large quantity of pills which had been observed in his room by motel personnel and later the officers, although he was not prosecuted for these. By overruling defendant's motion to suppress, the court allowed the introduction of a large quantity of pills for which defendant was not prosecuted, and prejudiced him in the eyes of the jury, adversely affecting the whole outcome of defendant's case. For these reasons appellant again contends that his constitutional rights were not protected.

Conclusion

Appellant strongly contends that the testimony adduced at the hearing on defendant's motion to suppress would have, by the Court's own interpretation in its opinion, been sufficient to cause the Circuit Court to sustain defendant's motion to suppress; and yet, throughout this opinion the majority Court has ignored that testimony and has based its judgment on testimony which would never have been reached if appellant's constitutional rights were protected at the outset, that is, before a trial was had.

Therefore, appellant respectfully suggests that if the facts and testimony in evidence are reviewed, it will show they are

in direct conflict with the statements set out in the majority opinion of this Court and relied upon to substantiate its decision that there existed probable cause and a valid arrest. It is further suggested that the applicable law cited, when applied to the actual facts as shown by the testimony, should result in a reversal of Count I and Count II.

Respectfully submitted,

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Attorney for Appellant

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was mailed postpaid this 24 day of June, 1976, to:

John C. Danforth
Attorney General
Supreme Court Building
Jefferson City, Missouri 65101
Attorney for Respondent

David C. Godfrey

APPENDIX C

Clerk of the Supreme Court
State of Missouri
Jefferson City, Missouri
65101

Thomas F. Simon
Clerk

Telephone
(314) 751-4144

July 12, 1976

Mail
P. O. Box 150

Mr. David C. Godfrey
7755 Carondelet
Clayton, Missouri 63105

In re: State of Missouri vs. Ronald Eugene Brasel,
No. 59243

Dear Sir:

This is to advise that the Court this day has made the following order in the above-entitled cause:

"Appellant's motion for rehearing overruled."

Yours very truly,

THOMAS F. SIMON
Clerk

cc-
Attorney General